a

KAI TAI TIMBER COMPANY LTD. HONGKONG

v.

INTER MARITIME MANAGEMENT SDN. BHD.

b

HIGH COURT MALAYA, KUALA LUMPUR
DATO' HAJI ABDUL MALEK BIN HAJI AHMAD J.
[SUIT NO. D4-22-24-94]
2 SEPTEMBER 1994

c

PRACTICE & PROCEDURE: Application by defendant for stay of proceedings - Plaintiff claiming for loss of cargo carried by defendant's vessel from Malaysia to Hongkong - Injunction obtained against defendant - Exclusive foreign jurisdiction clause in bill of lading stating Japanese law applicable - Whether Japanese law or Malaysian law applicable - Consideration of the International Convention for the Unification of Certain Rules relating to Bills of Lading (the Hague Rules) and the Hague-Visby Rules.

d

The defendant's vessel, was carrying the plaintiff's cargo of Malaysian hardwood round logs from East Malaysia to Hongkong under a bill of lading when the ship capsized resulting in the loss of the cargo while in transit. The plaintiff brought a claim against the defendant to recover the loss and also obtained an injunction against the defendant. On 12 February 1994 the defendant filed an application to dismiss the plaintiff's writ but subsequently applied to amend the word "dismiss" to "stay" in the application .

e

Defendant's Counsel contended that pursuant to clause 3 of the bill of lading, Japanese law was applicable as it was the express choice of the parties and only if there was no express choice should the Court make an inference by objectively determining and applying the system of law with which the transaction had the closest and most real connection. The defendant stressed that until the proceedings were stayed or set aside, the injunction remained valid and challenging the injunction would be taking a step in the proceedings. He also submitted that it was unclear whether Japanese law limited liability under the bill of lading to less than that stipulated under the Hague-Visby Rules. Furthermore, there was no evidence that Japan had adopted the said Rules.

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Plaintiff's Counsel pointed out that clause 3 was qualified by the words "except as may be otherwise herein" and as the cargo was from Malaysia and the bill of lading was issued in Malaysia, the provisions of Malaysian law, which gave effect to the International Convention for the Unification of Certain Rules relating to Bills of Lading signed at Brussels on 25 August 1924 (the Hague Rules) were applicable. He submitted that there was confusion as to whether the Hague Rules or the Hague-Visby Rules applied in Japan in view of the amendments to the Japanese legislation. Furthermore the defendant had taken a step in the proceedings by submitting themselves to the jurisdiction of the Malaysian Court. Apart from that the defendant resided in Malaysia and the cause of action arose in Malaysia. The plaintiff denied any connection with Japan as it was a resident of Hongkong and the vessel sailed from East Malaysia to Hongkong. Furthermore, being a Malaysian registered vessel, the documents on its seaworthiness

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were most likely in Malaysia, expert evidence relating to the cargo of Malaysian logs was likely to be available locally and as the vessel sank somewhere between Malaysia and Hongkong, the weather reports would be more readily available here than in Japan. The costs of transporting the crew rescued, the majority of whom were Filipinos, as witnesses would also be cheaper to Malaysia than to Japan. Counsel also argued that since the injunction order was obtained in Malaysia, the plaintiff would have to sue on a judgment obtained in Japan as there was no provision for reciprocal enforcement.

Held:

[1] The authorities cited leaned toward the grant of an order for stay of proceedings where there was a breach of an exclusive foreign jurisdiction clause but qualified the position by stating that it was essentially a matter of discretion if the facts and circumstances were so strong as to amount to a good reason for the Court to hold otherwise.

[2] On the facts of this case, although there was an exclusive foreign jurisdiction clause for the dispute to be heard in Japan, it was not disputed that the defendant was resident in Malaysia and the vessel was registered here. It was also conceded that the cargo was loaded in East Malaysia and the vessel was enroute to Hongkong. Evidencewise it would be cheaper to transport the Filipino crew members here than to Japan. All other relevant documentary evidence was also readily available here. The plaintiff could also have some difficulty in enforcing a judgment obtained in Japan. Further, there was also some confusion as to whether the Hague Rules or the Hague-Visby Rules applied in Japan to determine the limit of liability. On these considerations the matter would be more appropriately dealt with here than in Japan.

[Application fro stay of proceedings dismissed with costs].

Cases referred to:

Amerco Timbers Pte. Ltd. v. Chatsworth Timber Corporation Pte. Ltd. [1977] 2 MLJ 181. ***(cit)***

Mackender And Others v. Feldia A.G And Others [1967] 2 QB 590. ***(cit)***

*Malayan Banking Berhad v. International Tin Council and another appeal [1989] 3 MLJ 286 / [1989] 2CLJ 961****(cit)***

Owners of Cargo Lately Laden on Board the Ship or Vessel Eleftheria v. The Eleftheria(Owners) [1970] Probate 94. ***(cit)***

Pacific Electric Wire & Cable Co. Ltd. & Anor. v. Neptune Orient Lines Ltd. (Toko Kaiun Ltd. third party and Prima Shipping Sdn. Bhd. fourth party) [1993] 3 SLR 60. ***(cit)***

The King v. International Trustee For The Protection of Bondholders Aktiengesellschaft [1937] AC 500. ***(cit)***

The "Morviken" [1983] LLR 1. ***(cit)***

"The Vishva Apurva"; Owners of Cargo lately laden on board the Ship or Vessel "Vishva Apurva" v. Owners and other persons interesed in the Ship or Vessel "Kalidas" [1991] 2 MLJ 440. ***(cit)***

Vita Food Products, Incorporated v. Unus Shipping Company, Limited (in liquidation) [1939] AC 277. ***(cit)***

Whitworth Street Estates (Manchester) Ltd. v. James Miller And Partners Ltd. [1967] 1 WLR. 377. ***(cit)***

Legislation referred to:

Rules of the High Court 1980, O. 12 r. 7(1)(2)

For the plaintiff:- M. Nagarajah (A. Mahendra with him); M/s. Shook Lin & Bok.
For the defendant- Pawancheek Merican; M/s. Wan Marican, Hamzah & Shaik.

JUDGMENT

Haji Abdul Malek bin Haji Ahmad J:

The defendant's vessel Interhill King had on the 16 August 1993 carried the plaintiff's cargo of 6,378 pieces of freshly cut Malaysian hardwood round logs said to measure 4,879.6806 cubic metres from Kuala Mukah in Sarawak, East Malaysia to Hong Kong under bill of lading No. KTL/93/62. In their statement of claim, the plaintiff had pleaded that it was the duty of the defendant and their servants, agents, bailess and carriers to deliver the said cargo in the same good condition and order as it was when shipped implying that it was their responsibility to excercise care in and about the handling, loading, custody, care carriage, delivery and discharge of the cargo. Unfortunately for both parties, the ship had capsized some time between 20 and 21 August 1993 and in consequence, the cargo was lost while in transit.

On 12 February 1994, the defendant had filed a summons in chambers asking for an order that the Court dismiss the plaintiff's writ of summons and indorsement with costs under O. 12 r. 7 (1) and (2) of Rules of the High Court 1980. At the outset, learned Counsel for the defendant had applied to amend the word "dismiss" to "stay" and learned Counsel for the plaintiff had not made any objection. Learned Counsel for the defendant had referred to clause 3 of the bill of lading which states-

> 3. (Governing Law and Jurisdiction) The contract evidenced by or contained in this Bill of Lading shall be governed by Japanese Law except as may be otherwise herein, and any action thereunder shall be brought before the Tokyo District Court in Japan.

and had reiterated that the applicable law is Japanese law and that the proper venue would be the Tokyo District Court in Japan. He had also made mention of clause 2 which stipulates-

> 2. (Clause Paramount) This Bill of Lading shall have effect subject to the provisions of the International Carriage of Goods by Sea Act 1957 of Japan, unless it is adjudged that any other statute of a nature similar to the International Convention for the Unification of Certain Rules relating to Bills of Lading signed at Brussels on 25 August 1924 compulsorily applies to this Bill of Lading, in which case it shall have effect subject to the provisions of such Statute and the said Act or Statute shall to be incorporate herein.
>
> Nothing herein contained shall deprive the Carreir of any protection from, or limitation of liability authorized by any provisions of any nation's laws, statutes or regulations which may be pertinent.
>
> If any provision of this Bill of Lading is held to be repugnant to any extent to the Hague Rules Legislation or any other laws, statutes or regulations applicable to the contract evidenced by this Bill of Lading, such provision shall be null and void to such extent but no further.

He added that in these circumstances, the express choice governs, subject to certain limitations. Only if there was no express choice, he added, would the

Court examine for the inferred choice of the proper law. Otherwise, he said, the Court should objectively determine and apply the system of law with which the transaction has the closest and most real connection. He stressed that this application was necessary as until the proceedings are stayed or set aside, the injunction remains valid. Learned Counsel had also explained that they did not challenge the injunction as that would be taking a step in the proceedings. He had also submitted that it was not clear whether Japanese law had prescribed the limit to liability under this bill of lading which is less than that stipulated under the Hague-Visby Rules and there is also no evidence that Japan had adopted the said Rules.

Learned Counsel for the plaintiff had pointed out that clause 3 of the bill lading was qualified by the words "except as may be otherwise herein" and it therefore followed that as the carriage of the cargo was from Malaysia and the bill of lading was issued in Malaysia, the relevent provisions of the Malaysian law, which gives effect to the International Convention for the Unification of Certain Rules relating to Bills of Lading signed at Brussels on the 25 August 1924 (hereinafter "the Hague Rules") are applicable.

He had also submitted that there was some confusion as to whether the Hague Rules or the Hague-Visby Rules, which came into force on the 1 June 1993 in Japan, applied in Japan in view of the amendments made to the Japanese legislation. Since the bill of lading gave effect to the Hague Rules, he added that there seemed to be a conflict of the legal position in Japan with regards to the Rules applicable to the relevant bill of lading.

Apart from this confusion, learned Counsel for the plaintiff had argued that there was no dispute that the defendant resided in Malaysia and the cause of action arose here. Further, the defendant had taken a step in the proceedings by submitting themselves to the jurisdiction of the Court here. He also said the plaintiff had no connection with Japan as it is resident in Hong Kong and although the vessel frequently sailed to Japan, in this instance the journey was from Kuala Mukah in Sarawak, East Malaysia to Hong Kong.

He further stated that being a Malaysian registered vessel, the records and files on its seaworthiness was most likely to be in Malaysia. Also, since the cargo was Malaysian hardwood round logs, expert evidence of this was most likely available here. He added that the vessel sank somewhere between Malaysia and Hong Kong and therefore the weather reports and conditions would be more readily and easily available here than in Japan. Of the crew members rescued, eighteen were Filipinos and there Malaysians. The cost of transporting the Filipino witnesses for the trial, he emphasised, would be cheaper to Malaysia than to Japan. Learned Counsel for the plaintiff had also argued that since the injunction order was obtained in Malaysia, they would have to sue on a judgment obtained in Japan as there is no provision for reciprocal enforcement.

The authorities cited lean towards the grant of an order for a stay of proceedings where there is a breach of an exclusive foreign jurisdiction clause but qualifies the position by stating that it is essentially a matter of discretion if the facts and circumstances are so strong as to amount to a good reason for the Court to hold otherwise.

On the facts of this case, although there is an exclusive foreign jurisdiction clause for the dispute to be heard in Japan, it is not disputed that the defendant is resident in Malaysia and the vessel is registered here. It is also conceded that the cargo was loaded in East Malaysia and the vessel was enroute to Hong Kong. Evidencewise, it would be cheaper to transport the Filipino crew members here than to Japan. All other relevant documentary evidence was also readily available here. The plaintiff could also have some difficulty in enforcing a judgment obtained in Japan. Further, there is also some confusion as to whether the Hague Rules or the Hague-Visby Rules apply in Japan to determine the limit of liability.

On these considerations, it was my view that the matter could and would be more appropriately dealt with here than in Japan. Accordingly, I had dismissed the defendant's application with costs.